SUPREME COURT, U. S.

FILED

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JOHN F. DAVIS, CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 623

DAVID BARNER TROUTMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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Petitioner, David Barner Troutman, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Eighth Circuit entered on July 22, 1969, in the above entitled cause.

CITATION TO THE OPINION BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit, printed in Appendix attached hereto, *infra,* pages 1a-15a, is unreported at the present.

JURISDICTION.

The opinion and judgment of the Court of Appeals were filed and entered on June 20, 1969. A Petition for Rehearing was filed and was denied on July 22, 1969. On August 14, 1969, an Order was entered extending time to file the Petition for Writ of Certiorari to and including September 20, 1969. This Petition for Writ of Certiorari will be timely filed on or before September 20, 1969.

The Jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED.

1. Does a Selective Service local board abuse its discretion when it refuses to remove a registrant from delinquency after he has cured that delinquency and proceeds to order him to report for induction as a delinquent, even though he is not otherwise liable for induction?

2. Did the decision of the Eighth Circuit Court of Appeals in this case so far depart from the accepted and usual course of judicial proceedings that this Court should exercise its power of supervision?

3. Should the "basis in fact" test, be used as the standard to test the validity of maintaining a registrant in delinquency status by a Local Board?

4. Are a registrant's due process rights violated when he is ordered to report for induction as a form of punishment after he has cured his delinquency?

CONSTITUTIONAL PROVISION INVOLVED.

Amendment V to the United States Constitution provides in pertinent part:

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

STATUTES INVOLVED.

50 U.S.C. App. Section 462 (a) provides in material part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title (sections 451-454 and 455-471 of this Appendix), or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000.00, or by such fine and imprisonment . . ."

SELECTIVE SERVICE REGULATIONS INVOLVED.

32 CFR Part 1642: Section 1642.1, Section 1642.2, Section 1642.3, Section 1642.4, Section 1642.10, Section 1642.11, Section 1642.12, Section 1642.13, Section 1642.14, Section 1642.15, the full texts of which are hereafter set forth in the Appendix hereto, pages 18a through 21a.

STATEMENT OF THE CASE.

On November 29, 1967, an indictment was filed in the Eastern District of Missouri, Eastern Division, charging the Appellant, David Barner Troutman, with the offense of willfully and knowingly failing and neglecting to submit to induction July 31, 1967, pursuant to the order of his Local Board in violation of Section 462, Title 50 App., U. S. Code. The Appellant pled not guilty on January 8, 1968. On March 14, 1968, trial was held. Appellant made an oral motion for dismissal of the indictment at the conclusion of the evidence of the plaintiff, ruling upon which was reserved. The trial was concluded and the Court allowed both parties time to submit briefs; the case to be submitted on the receipt of the final brief. On June 19, 1968, the Court found the Appellant guilty as charged in the indictment and sentenced him to imprisonment for five years. The appeal bond was set in the amount of $5,000. On June 21, 1968, a Notice of Appeal was filed (A. 1, 2)[1] The case was argued on appeal, and on June 20, 1969 the Eighth Circuit Court of Appeals affirmed.

The relevant facts in this case are not in dispute. On June 12, 1963, Appellant was classified III-A, as a married man with children (A. 17). On March 17, 1966, Local Board 163 sent a Current Information Questionnaire

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[1] In the Statement of the Case "A" refers to the Appendix of the Petitioner-Appellant in the Court of Appeals. Elsewhere in the petition that Appendix is referred to as "ACA". A small "a" refers to the Appendix to this petition.

(SSS Form No. 127) to the last address shown on his records, 1310 West Macon Street, Decatur, Illinois (A. 7). The Questionnaire was returned to the Board, the envelope indicating that the Appellate no longer lived at that address (2a). Appellant had moved from Decatur in 1963 (A. 37). On June 21, 1966, Local Board No. 163 classified the Appellant I-A, and on June 22, 1966, sent the Notice of Classification (SSS Form No. 110) to 1310 W. Macon Street (A. 8). On July 18, 1966, the second Questionnaire was mailed to the Appellant at 1310 W. Macon Street (A. 9). Neither of these items were returned to the Board and no response was received from the Appellant (A. 8, 9). On October 4, 1966, Local Board 163 sent the third Questionnaire to the Appellant at 2712 Flower Avenue, North Las Vegas, Nevada, an address supplied by the wife of the Appellant on July 18, 1966. The form was sent certified mail with return receipt requested, but it was returned (A. 9, 10).

On November 28, 1966, the Appellant was sent an Order to Report for Armed Services' Physical Examination (SSS Form No. 223) to the address on 1310 W. Macon Street, which was returned. The original was, thereupon, remailed to 708 Florence St. in Downey, California c/o the Sound Sleep Mattress Company, an address and name supplied by the wife of the Appellant on July 18, 1966. The form was not returned and the Appellant did not respond in any way or report for the examination, which was set for December 19, 1966 (A. 10-12). For failure to keep his Local Board informed of his correct current address and for failure to attend the examination, Local Board 163 declared Appellant delinquent on January 5, 1967. The Delinquency Notice (SSS Form No. 304) was sent to Appellant at 1310 W.

Macon Street on January 6, 1967 and it was returned to the Board marked addressee unknown (A. 12-14). On January 11, 1967, the Board ordered the Appellant to report for induction on January 26, 1967. The Order was mailed to 1310 West Macon Steet, Decatur, Illinois. However, it was returned by the Post Office marked addressee-unknown and the Appellant did not respond to the Order (A. 14, 15).

Appellant's file was referred to the United States District Attorney for the Southern District of Illinois, who in turn referred the matter to the Department of Justice and FBI (A. 26). In May of 1967, the Appellant was informed by the FBI that he had been drafted and that he was wanted. Thereupon, Appellant wrote a letter to the Board stating that he was willing to comply with the instructions and rules of the Board and that he had never made any attempt to avoid the Board's authority. The letter further indicated that he had not heard from the Board since a time prior to his leaving Decatur, Illinois and that he was presently supporting his children through his mother, although he was now separated from his wife (A. 26-38, 39, 44, 45).

On May 17, 1967, Local Board 163 received a letter from the United States Attorney for the Southern District of Illinois, stating that he was dropping prosecution on the matter because the Appellant was in contact with his Board (A. 27). The Board then wrote for instructions to the Director of Selective Service for Illinois and in a letter dated May 18, 1967, he gave the Board the authority to reopen the Registrant's classification, cancel his induction order and clear his delinquency (A. 29). On May 17, 1967, the Board sent Appellant a Current Information Questionnaire which was completed,

signed and returned by the Appellant to the Board (A. 30, 31). On June 20, 1967, Local Board 163 refused to reopen the classification of the Appellant or remove him from his delinquency status. On June 26, 1967, the Appellant was ordered to report for induction on July 31, 1967 (A. 31, 32). On July 4, 1967, Appellant wrote to the Clerk and the Board members, asking that his induction order be cancelled or postponed because his induction would work an extreme hardship on his mother and children (A. 26). On July 31, 1967, Appellant reported for induction but refused to submit to induction (A. 40).

Had Appellant not been a delinquent on June 26, 1967, he would not have been liable for induction on that date (ACA 25). During her testimony, the Clerk of the Board indicated that the Local Board 163 had ordered delinquents to report for induction, even after the registrants had been in contact with the Board and agreed to comply with the orders of the Board. She further testified that she could not remember any occasion, while she was clerk of the Board, that the Board had ever removed any registrants from delinquency (ACA 34, 35).

REASONS FOR GRANTING THE WRIT.

(1)

For the first time, this Court is being asked to determine an important question of Federal law, which has not been but should be settled by this Court, namely: Does a Selective Service local board abuse its discretion when it refuses to remove a registrant from delinquency after he has cured that delinquency and proceeds to

order him to report for induction as a delinquent, even though he is not otherwise liable for induction?

On June 20, 1967, Local Board 163 refused to remove Petitioner from his delinquency status, even though Petitioner had advised the Local Board of his current correct address, had established and maintained contact with the Board and had agreed to fulfill his Selective Service obligations, thus doing everything in his power to cure the delinquency (A.C.A., 26-31). On June 26, 1967, Petitioner was ordered to report for induction as a delinquent on July 31, 1967, and he failed to submit to induction on that day (A.C.A., 31-32). If the board had not maintained the Petitioner as a delinquent on June 20, 1967, he would not have been issued an induction order on June 26, 1967, because he was beyond twenty-six years of age at that time (A.C.A., 25). In fact, he was never liable to induction after April 8, 1964, Petitioner's twenty-sixth birthday (A.C.A., 23).

When the board refused to remove the Petitioner from a delinquent status, it was aware that the Petitioner was the sole support of his mother and his children, although he was separated from his wife. Petitioner informed Local Board 163 of this situation in his letter of May 9, 1967, on the Current Classification Questionnaire returned to the board in May, 1967, and letter dispatched to the Board on July 4, 1967 (A.C.A., 26, 27, 30, 44-46).

Petitioner was declared delinquent on January 5, 1967, as a result of his failure to keep his Local Board informed of his correct address, which resulted in his failure to receive a number of communications from his Local Board, which were dispatched, starting March 17, 1966 and ending November 28, 1966 (A.C.A., 7-15). Peti-

tioner testified that he was unaware of any desire on the part of Local Board 163 to communicate with him until May of 1967 (A.C.A., 38). The record supports this position with no substantial evidence to the contrary. Thereafter, the Board sent a Notice of Delinquency and an Order to Report For Induction to his Macon Street address in Decatur, both of which were returned "Addressee Unknown." Petitioner was reported as a delinquent to the United States Attorney for the Southern District of Illinois. He was investigated by the F.B.I. (A.C.A., 26).

Petitioner was contacted by the F.B.I. at his home at 2712 Flower Avenue on or about May 9, 1967. Thereupon, he wrote to his Local Board, stating that he had no knowledge that the Board wanted him and stating that he would fulfill his Selective Service obligation (A.C.A., 26-28). Thereafter, he maintained contact with his Board, responded to all correspondence, did respond to the order to report for induction, issued on June 26, 1967, but refused to submit (A.C.A., 40).[1] Petitioner testified that he would have submitted to induction, if other persons in his age group had also been called for induction (7a).

32 C.F.R. 1642.4 (A) states that a local board may declare a registrant a delinquent if he fails to perform any duty required of him under the selective service law other than the duty to report for induction or the duty to comply with a civilian work order. 32 C.F.R., 1642.4 (C) recites that a registrant who has been declared a delin-

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[1] This was the only way in which Petitioner could test the validity of his order to report for induction. *Oesterich* v. *Selective Service System*, 393 U.S. 233 (1968), which allows pre-induction civil review, had not yet been decided.

quent may be removed by his local board at any time (19a). No standards are set forth for the exercise of this discretion. The Solicitor General of the United States, however, recently articulated the standards that must govern the exercise of this power:

> "While military service undoubtedly involves hardship and restraint, it also represents a duty commonly owed by all citizens. The delinquency regulations are designed as an administrative means of insuring that the Registrant complies with the duties he personally owes to his Local Board and the Selective Service System—and to the public generally. Since they seek to render self-defeating any attempt by the Registrant to cut himself off from contact with the Selective Service System, *these regulations are basically remedial rather than punitive in nature.* Indeed, the primary purpose of delinquency reclassification is to bring the registrant back into compliance with his duties. *Until the moment of induction, the Registrant has the opportunity to have his delinquency status changed if he corrects his default,* and a delinquent Registrant who has been reclassified I-A may be restored to his prior classification which would otherwise be applicable (See 32 C.F.R. 1642.4(c), 1642.14). *In essence, the delinquency regulations are analogous to the civil contempt action since they are a means whereby the Selective Service System may facilitate its operation by compelling registrants to perform their duties under the pertinent laws and regulations.*" Memorandum for the Respondents, pp. 7-8 *Oesterreich* v. *Selective Service System*, No. 1246, October Term, 1968, (U.S.S.C. 1968). (Italics added)

In this cause, the remedial purpose of the delinquency regulations had been served, when Petitioner resumed and maintained contact with Local Board 163 and agreed

to fulfill his selective service duties. In fact, he promptly filled out and returned a Current Information Questionnaire to the Board, shortly after it was dispatched to him (A.C.A. 30-31). At the same time, Local Board 163 was aware that Petitioner was the sole support of his mother ~~and his~~ children, even though he was separated from his wife and was aware that he was not subject to induction except as a delinquent. (A.C.A., 25-26, 30-31). In this connection, it is important to note that Petitioner passed his twenty-sixth birthday on April 8, 1964, almost two years prior to the first attempt by Local Board 163 to contact him on March 17, 1966 (A.C.A., 7).[2]

Even though Petitioner had taken all these steps to cure his delinquency, Local Board 163 refused to remove him from that status (A.C.A., 31). The Board gave no reasons for this decision. By its refusal, the Board was no longer using the delinquency power to compel Petitioner to abide by his Selective Service duties, since this had already been done; rather, it was seeking to punish Petitioner for what it considered past misdeeds. This is not the purpose of the delinquency power and Local Board 163 abused its discretion by using the delinquency power for that purpose.

During her testimony, the Clerk of the Board stated that Local Board 163 had ordered delinquents to report

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(2) This sequence of events renders totally inapplicable Footnote 3 in the Opinion of the Court below, which states in part the following: "... If appellant were to prevail in his contentions his failure to notify his local board of his change of address and dependency status and his failure to report for physical examination—all violations of his Selective Service duties—would result in his conversion of a deferment to an effective exemption." (11a, 12a). Petitioner was not liable for induction in the period in which these alleged violations of his Selective Service duties occur.

for induction, even after the registrants had been in contact with the Board and agreed to comply with the orders of the Board. She further testified she could not remember any occasion while she was Clerk of the Board, a six year period, when the Board had ever removed any registrant from delinquency (A.C.A., 34-35).

Upholding this abuse of discretion by Local Board 163 would result in consequences aptly described by Justice Douglas in *Oestereich* v. *Selective Service System*, 393 U.S. 233 (1968), at 237:

> "So to hold will make the Boards freewheeling agencies meting out their brand of justice in a vindictive manner."

As Justice Douglas also observed in the same opinion:

> "We deal with conduct of a local board that is basically lawless." 393 U.S., at 237.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal law, which is presented in this Court for the first time.

(2)

The decision of the Eighth Circuit Court of Appeals has so far departed from the accepted and usual course of judicial proceedings that this Court must review the decision in this Cause.

The Court of Appeals made a number of statements in its opinion which are without support in the facts or the law and which it refused to correct when Petitioner pointed out these errors in his Petition for rehearing (17a).

In the course of its opinion the Court states that Local Board 163 properly reclassified Petitioner from III-A to I-A on June 21, 1966, because the Current Information Questionnaire was sent to Petitioner at his last known address on March 17, 1966 (8a, 9a). The Court recites 32 C.F.R. 1622.1 (c) in support of this position (8a). That Regulation is completely inapplicable, because it refers to a *Classification Questionnaire* (SSS Form 100), while the questionnaire the Local Board issued is a Current Information Questionnaire (SSS Form 127). A Classification Questionnaire is completed by the registrant shortly after registration. It is designed to elicit all the information necessary for initial classification after registration, when the Local Board has no information at all regarding the registrant. The Current Information Questionnaire is dispatched by the Local Board from time to time in order to determine if there is any new information about the registrant, *in addition to that already in possession of the Board, which will warrant a classification other than I-A.*

The Local Board must classify a registrant I-A, if he does not provide information in his Classification Questionnaire, which would entitle him to another classification, or fails to return that Questionnaire to the Board, *because it has no other information about him with which to classify him otherwise.* The same may not be true with the dispatch of a Current Information Questionnaire, because the Board may already have information in its possession justifying a classification other than I-A.

In the present case, Local Board 163 had information that Petitioner was living with his wife and children when it sent a Current Information Questionnaire on March 17, 1966, which was returned marked "Addressee

Unknown" (A.C.A., 7). When the Local Board changed his classification from III-A to I-A on June 21, 1966, it had the same information that it had on June 12, 1963, when it originally classified him III-A, namely, that he was a married registrant living with his two children. Local Board 163 had no factual basis for making the change of classification on June 21, 1966, and 32 C.F.R. 1621.1 (c) gives the Board no legal basis. This Regulation was completely miscited by the Court of Appeals.

During the course of its opinion, the Court states the following:

> "Appellant upon his reclassification to I-A, had the right to appear in person before the local board and the right to appeal his classification. 32 C.F.R. Sections 1624.1, 1624.2, 1626.2. He did not exercise these rights." (9a).

It is clear that this statement by the Court below is based upon an implied finding of fact that Petitioner received the Notice of Classification mailed to him at the Macon Street address on June 22, 1966, even though Petitioner and his mother both stated that he had not lived there since June of 1963 and most of the communications mailed to that address were returned "Addressee Unknown." (A.C.A., 7-15, 47). The Court of Appeals concluded that he received this Notice because it did not return, which conclusion has no foundation in the facts. This same is true of the following:

> "July 14, 1966. A Current Information Questionnaire was mailed to appellant at 1310 West Macon Street, Decatur, Illinois. This questionnaire was *not* returned by the post office and appellant did not reply thereto." (2a).

Again the Court is assuming that Petitioner received the questionnaire simply because it was not returned, contrary to all the evidence.

Further, the Court states that a registrant has the right of personal appearance and appeal after a declaration of delinquency (10a). From the standpoint of the Selective Service System, this recitation is also erroneous. According to this interpretation, 32 C.F.R. 1642.14 grants a delinquent registrant the right of personal appearance and appeal only when he is reclassified from some other classification to I-A at the time he is also declared a delinquent. For example, a registrant with a II-S classification, who is declared a delinquent and classified I-A, has the right of personal appearance and appeal. However, these rights are a consequence of reclassification and not of the declaration of delinquency. The man who is already I-A has no right of personal appearance and appeal, if he is declared delinquent.

Petitioner was classified I-A on June 21, 1966. He was declared a delinquent on January 5, 1967. According to the Selective Service System interpretation, Petitioner had no right of personal appearance and appeal from the declaration of delinquency on January 5, 1967. For that reason, the Court's contention that "Appellant did not timely exercise these rights" is both wrong and unfair (10a).

Finally the Court below states that Local Board 163 was entitled to conclude "that he had wilfully failed to report for an Armed Forces Physical Examination." (14a). This Conclusion is based upon the fact that the notice for that examination was sent to Petitioner c/o Sound Sleep Mattress Company, 708 Florence St., Dow-

ney, California, and not returned. Petitioner never gave this address to the Board. His wife told the Board on July 18, 1966 that he had money invested there (A.C.A., 33). The Court's Conclusion that the Board could find that he received the notice and wilfully failed to comply is without foundation in the record.

On the basis of the foregoing, it is imperative that this Court exercise its supervisory power and review this Cause.

(3)

The Court of Appeals for the Eighth Circuit has decided in this case an important question of Federal law which has not been, but should be, settled by this Court, namely: Should the "basis in fact" test, be used as the standard to test the validity of maintaining a registrant in delinquency status by a Local Board?

The Court of Appeals held that Local Board 163 had a "basis in fact" for maintaining Petitioner in delinquency status (14a). The Court was in error in using the "basis in fact" test in order to determine whether or not Local Board 163 abused its discretion in maintaining the Appellant in his delinquency status. This position by the Court shows a fundamental confusion between classification and delinquency status. The "basis in fact" test is used to determine whether or not a Local Board has *properly classified* a registrant.[5] *A declaration of delinquency is not a classification.* Petitioner is unaware of any authority to support this novel position by the Court.

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[5] See 50 U.S.C. App. 470 (b) (3), also, *Estep* v. *United States*, 327 U.S. 114 (1946).

Apart from its novelty, Petitioner urges that the "basis for fact" test is not proper as a standard by which to determine whether or not Local Board 163 abused its discretion in maintaining Petitioner's delinquency status. Since the purpose of the declaration of delinquency is remedial, the use of the *past conduct* of the Petitioner as a justification for maintaining him in delinquency, once he has done everything in his power to cure that delinquency, is incorrect. Since the remedial purpose of the delinquency power had been completely satisfied, there was no other reason for maintaining the Petitioner in that status.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Law.

(4)

The Court of Appeals for the Eighth Circuit has decided in this case an important question of Federal Constitutional Law which has not been, but should be, settled by this Court, namely: Are a registrant's due process rights violated when he is ordered to report for induction as a form of punishment after he has cured his delinquency?

Petitioner was declared a delinquent by the local board on the basis of his failure to report for a physical examination (3a).[1] However, there was no showing that Peti-

[1] This was the reason given by the local board in its notice of delinquency form (SSS Form 304) of January 5, 1967. On February 6, 1967 when the local board informed the U.S. attorney of Petitioner's delinquency (SSS Form 301), it gave as an additional reason Petitioner's failure to notify the local board of his correct address.

tioner ever received his order to report for a physical examination (3a). And though Petitioner did fail to keep his local board informed of his current address, he claimed he was not aware of regulations that required him to notify his local board of his whereabouts after age twenty-six. Nevertheless, the Court of Appeals held that:

> "... The local board was entitled to conclude: (1) That appellant had received ... his Order to Report for Armed Forces Physical Examination, mailed November 28, 1966 ... (2) that he had willfully failed to notify the local board of his change of address ... and (3) that he had willfully failed to report for Armed Forces Physical Examination." (14a).

Petitioner could have been prosecuted in a court of law pursuant to 50 U.S.C. App. Sec. 462 (a) for knowing failure to perform a duty required by the Selective Service Act. At such time he could have presented his defenses in court as to his knowledge of the duties required of him. However, he was never given this opportunity. Instead, his local board branded him a "delinquent," and refused to remove him from that status even after he informed them of his ignorance of the duties required of him and expressed his willingness to fulfill these duties now that he was aware of them. Then the local board ordered Petitioner for induction as a "delinquent."

Petitioner was never accorded a hearing on his delinquency status. Thus, he was never able to present any defenses or any witnesses on his own behalf. Nor was he able to confront any witnesses against him. And, but for his delinquency status, he never would have been ordered for induction (6a). Thus, the local board sought to circumvent the due process rights of the Petitioner

by ordering him to report for induction as a delinquent as a means of punishing him for his past acts, although he had ceased to be a delinquent. In essence this was conviction and punishment of the Petitioner without due process.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Federal Constitutional Law.

CONCLUSION

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX 1

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 19,405

United States of America,
Appellee,

vs.

David B. Troutman,
Appellant.

Appeal from the United States District Court for the Eastern District of Missouri.

[June 20, 1969.]

Before VAN OOSTERHOUT, Chief Judge; VOGEL and HEANEY, Circuit Judges.

VOGEL, Circuit Judge.

This is an appeal from a judgment of conviction of willfully and knowingly failing and neglecting to submit to induction into the armed forces of the United States, in violation of 50 U.S.C.App. § 462. Appellant contends that his local draft board improperly maintained him in a delinquent I-A classification and ordered him for induction. We affirm.

The issue in this case must be determined from the information and evidence furnished by appellant in the administrative proceeding. *Cox* v. *United States*, 1947, 332 U.S. 442, 453-455; *Vaughn* v. *United States*, 8. Cir., 1968,

404 F.2d 586, 587, a chronological review of which shows the following:

April 13, 1956. Appellant registered with his local board in Decatur, Illinois.

Between April 13, 1956, and June 12, 1963, appellant was alternately classified II-S or I-A, thereby extending his liability for military service to age 35. 50 U.S.C.App. § 456 (h); 32 C.F.R. § 1622.1.

June 12, 1963. The appellant was granted a III-A dependency deferment on the basis of being a married registrant with two children.

March 17, 1966. A Current Information Questionnaire was sent to appellant at his last known address, 1310 West Macon Street, Decatur, Illinois. This questionnaire was returned by the post office marked "Addressee Unknown".

March 31 and May 4, 1966. Letters of inquiry as to appellant's whereabouts were sent to his mother at 944 West Packard Street, Decatur, Illinois, who had been listed by him as the person who would always know his address. The letter of March 31, 1966, was returned on May 9, 1966, with the notation "David left Decatur June 7—1963. I don't know where he is."

June 21, 1966. Appellant was classified I-A.

June 22, 1966. A Notice of Classification was mailed to appellant at 1310 West Macon Street, Decatur, Illinois. This notice was *not* returned by the post office and appellant did not appeal from his reclassification.

July 18, 1966. A Current Information Questionnaire was mailed to appellant at 1310 West Macon Street, Decatur, Illinois. This questionnaire was *not* returned by the post office and appellant did not reply thereto.

Appellant's wife advised the clerk of the local board, by telephone, that appellant was living at 2712 Flower Avenue, North Las Vegas, Nevada; had not lived with her for two years; had money invested in the Sound Sleep Mattress Company, 708 Florence Street, Downey, California; and partially supported his children, who lived with his mother.

October 4, 1966. A Current Information Questionnaire was sent to appellant by certified mail at 2712 Flower Avenue, North Las Vegas, Nevada. This letter was returned by the post office as "Unclaimed".

November 28, 1966. An Order to Report for Armed Forces Physical Examination on December 19, 1966, was mailed to appellant at 1310 West Macon Street, Decatur, Illinois. This Order was returned by the post office marked "Addressee Unknown". The Order was then remailed to appellant c/o Sound Sleep Mattress Company, 708 Florence Street, Downey, California. The post office did *not* return this Order.

December 19, 1966. Appellant did not report for physical examination.

January 5, 1967. Appellant was declared a delinquent by a 3-0 vote of the local board on the basis of his failure to report for physical examination and he was so reported to the Decatur, Illinois newspaper.

January 6, 1967. A Delinquency Notice was mailed to appellant at 1310 West Macon Street, Decatur, Illinois. This Notice was later returned marked "Addressee Unknown".

January 11, 1967. An Order to Report for Induction on January 26, 1967, was mailed to appellant at 1310 West

Macon Street, Decatur, Illinois. This Order was later returned by the post office marked "Addressee Unknown".

January 26, 1967. Appellant failed to report for induction.

February 6, 1967. The local board reported appellant as a delinquent to the United States Attorney for the Southern District of Illinois on the basis of his failure to report for induction, failure to notify the local board of his correct address, and failure to report for Armed Forces Physical Examination.

May . . ., 1967. The FBI located appellant at 2712 Flower Avenue, North Las Vegas, Nevada.

May 9, 1967. The appellant wrote the local board, stating that he was willing to comply with their instructions and rules; had never attempted to avoid the board's authority; had not received any correspondence from the board for the past five years or more; and was "ignorant of your regulations that required me to notify you of my whereabouts even after age 26".

May 16, 1967. The local board wrote to appellant, advising him of his duty to keep the local board informed of his current address and status at all times, of the many attempts to locate him, and of the facts underlying his delinquency classification and his reference to the United States Attorney for prosecution.

The United States Attorney wrote the Assistant Attorney General, Criminal Division, that "[d]ue to the fact the Local Board is now in contact with the registrant, we are declining prosecution in this case and closing our file".

May 17, 1967. A Current Information Questionnaire was mailed to appellant, which he returned on May 25, 1967. Appellant stated in this questionnaire that he was self-

employed, married but not living with his wife, and had two children living with his mother through his support.

The clerk of the local board wrote the State Director, Selective Service System: "Should this registrant again be ordered for induction as a delinquent even though he is over age 26? Please advise."

May 18, 1967. The State Director wrote the local board:

> "If it meets with the approval of your local board; this is your authority to reopen the registrant's classification, cancel his Order to Report for Induction, and to clear his delinquency."

June 20, 1967. The local board voted 5-0 to maintain appellant as a delinquent I-A.

June 23, 1967. The local board wrote appellant:

> "The United States Attorney declined prosecution, since you had been located and had contacted the Local Board.
>
> "The Local Board reviewed your file at their meeting on June 20, 1967, but were of the opinion that the information submitted did not warrant a reopening of your classification, or removal from delinquency status. Therefore, you will remain in Class I-A, and will be ordered for induction in July."

June 26, 1967. The local board mailed an Order to Report for Induction on July 31, 1967, to appellant at 2712 Flower Avenue, North Las Vegas, Nevada.

July 4, 1967. Appellant requested, by letter, "cancellation or postponement" of his induction and "reconsideration and reclassifcation", stating that "conscription would work real and extreme hardship on my Mother and children who couldn't *begin* to sustain themselves on an Army allotment." Appellant also unsuccessfully sought relief by letter to the State Director and by telegram to General Lewis B. Hershey, Director of the Selective Service System.

July 7, 1967. After the clerk of the local board contacted three board members concerning appellant's July 4th letter, she wrote appellant:

> "Please be advised that the Local Board did not wish to postpone your Order to Report for Induction on July 31, 1967 or to request authority from the State Director to cancel your Induction Order. Therefore, you should report for Induction as ordered on July 31, 1967."

July 31, 1967. Appellant reported for induction, but refused to submit thereto, writing out and signing a statement, "I refuse to be inducted into the Armed Forces of the United States."

Appellant was indicted on November 29, 1967, and thereafter tried to the court without a jury, the Honorable Roy W. Harper, Chief Judge, presiding.

At the trial, the clerk of the local board testified that appellant, had he not been declared a delinquent, would have been in category 5 of the I-A classification, which consists of registrants aged 26 to 35; that the local board had never to her knowledge drafted anyone out of the category 5; that appellant, had he not been delinquent, would not have been in any group which at that time was being ordered to report for induction by the local board; that it was the customary procedure of the board to order delinquents to report for induction after they had been in contact with the board and agreed to comply with its orders; and that she didn't remember the board ever removing a registrant from delinquency status pursuant to 32 C.F.R. § 1642.4 (c).

Appellant testified that he left Decatur, Illinois, in June 1963 and that he did not notify the board of his change of address, because "I didn't know that I needed to, nor

that they would be interested"; that from February 1966 to July 1966 he paid $300 per month support for his children and mother, and from July 1966 until the trial he had paid $200 per month support for his children and mother; that in July 1966 he was ordered by the court to pay $100 per month per child for the support of his children and was deprived of their custody; that he was his mother's only source of support, except for $22 a month from the rental of a garage; and that he would have submitted to induction if other persons in his age group had also been called for induction.

Appellant was found guilty and sentenced to five years' imprisonment.

Initially, we must note the admonition of the Supreme Court "that it is not for the courts to sit as super draft boards, substituting their judgments on the weight of the evidence for those of the designated agencies. Nor should they look for substantial evidence to support such determinations. *Dickinson* v. *United States,* 346 U.S. 389, 396 (1953)." *Witmer* v. *United States,* 1955, 348 U.S. 375, 380-381, 75 S.Ct. 392, 398, 99 L.Ed. 428; *Vaughn* v. *United States,* supra, 8. Cir., 1968, 404 F.2d 586, 589. This court is permitted to overturn a draft classification only if it has "no basis in fact", 50 U.S.C.App. § 460 (b) (3);[1]

[1] § 10 (b) (3) of the Selective Service Act, 50 U.S.C. App. § 460 (b) (3), provides in pertinent part:

"* * * No judicial review shall be made of the classification or processing of any registrant by local boards, appeal boards, or the President, except as a defense to a criminal prosecution instituted under section 12 of this title (section 462 of this Appendix), after the registrant has responded either affirmatively or negatively to an order to report for induction, or for civilian work in the case of a registrant determined to be opposed to participation in war in any form: Provided, That such review shall go to the question of the jurisdiction herein reserved to local boards, appeal boards, and the President only when there is no basis in fact for the classification assigned to such registrant."

Estep v. United States, 1946, 327 U.S. 114, 122, 66 S.Ct. 423, 90 L.Ed. 567; *Vaughn v. United States*, supra, at 589; or if we find that the local board's action has the effect of denying appellant basic procedural fairness, *Vaughn v. United States*, supra, at 590. Further,

> "It is properly presumed that a registrant's Board has fully considered all relevant information presented to it, and that it has classified and processed him regularly, and in accordance with the applicable statutes and regulations. *Ferry v. United States*, 378 F.2d 931 (1967); *Storey v. United States*, 370 F.2d 255 (1966). * * * *Oestereich v. Selective Service System*, 1968, 393 U.S. 233, 241 (Harlan, J., concurring).

Under 32 C.F.R. § 1622.30, the local board "shall" place in class III A "any registrant who has a child or children with whom he maintains a bona fide family relationship in their home", with certain exceptions not here pertinent and "any registrant whose induction into the armed forces would result in extreme hardship * * * to his wife, divorced wife, child, parent, grandparent, brother, or sister who is dependent upon him for support * * *".

No Selective Service classification is permanent. 32 C.F.R. § 1625.1 (a). Each registrant is considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. 32 C.F.R. §§ 1622.1 (e), 1622.10. The mailing by the local board of a classification questionnaire to the latest address furnished by a registrant is notice to the registrant that he will be classified I-A unless information is presented to the local board which will justify his deferment or exemption from military service. 32 C.F.R. § 1622.1 (e).

A Current Information Questionnaire was sent to appellant at his last known address on March 17, 1966. This

local board therefore properly reclassified appellant from 1-A to 1-A on June 21, 1966.

Appellant, upon his reclassification to 1-A, had the right to appear in person before the local board and the right to appeal this classification. 32 C.F.R. §§ 1624.1, 1624.2, 1626.2. He did not exercise these rights.

The effect of appellant's reclassification to 1-A was to place him in category 5 in the order of call of 1-A registrants. Thus, among 1-A registrants, appellant would be subject to induction after delinquents, volunteers under age 26, and non-volunteers between the ages of 19 and 26. 32 C.F.R. § 1631.7.

It is the duty of each registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, physical condition, home address, and receipt of any professional degree within ten days after any such change. 50 U.S.C. App. § 462, 32 C.F.R. §§ 1625.1(a), 1641.7(a). Each registrant is charged with notice of this duty, 50 U.S.C. App. § 462(a), 32 C.F.R. § 1641.1, and, in fact, this requirement is printed on his registration card and notice of classification. Whenever a registrant has failed to perform any of his duties under the Selective Service law, including notification of change of status, other than the duty to comply with an order to Report for Induction, the local board may declare him a delinquent. 32 C.F.R. § 1642.4(a). The local board therefore properly declared appellant a delinquent on the basis of his failure to report for Armed Forces Physical

A registrant's willful failure to keep his local board advised of his status is also a crime. Sigrist v. Kastrup, 377 F.2d 1011, 1013 (10th Cir. 1967), cert. denied, 389 U.S. 858, 50 U.S.C. App. § 462. In accordance with the general rule ignorance of the Selective Service law is no excuse. United States v. Manzanares, 274 F.2d 953, 955 (10th Cir. 1960), cert. denied, 363 U.S. 831.

Examination and his failure to notify the local board of his current address.

The effect upon appellant of the declaration of delinquency status was to move his order of call from category 5 (non-volunteers who have attained the age of 26 years) to category 1 (1-A registrants who must be given priority induction). 50 U.S.C.App. § 456(h)(1); 32 C.F.R. § 1631.7.

A registrant may be removed from delinquency status at any time by the local board, 32 C.F.R. § 1642.4(c), and a registrant, upon declaration as a delinquent, has the rights of personal appearance and appeal. 32 C.F.R. § 1642.14. Appellant did not timely exercise these rights.

Appellant contends that when he reestablished contact with the local board, the purpose of the delinquency regulations had been satisfied and the local board, by inducting him, turned these regulations into punitive measures under the rationale of *Oestereich v. Selective Service System*, 1968, 393 U.S. 233.

Oestereich stands for the proposition that a local board may not deprive a registrant of a statutory exemption by means of the delinquency regulations because of conduct or activities unrelated to the merits of granting or continuing that exemption. The Supreme Court stated:

> "We can find no authorization for that use of delinquency. Even if Congress had authorized the Boards to revoke statutory exemptions by means of delinquency classifications, serious questions would arise if Congress were silent and did not prescribe standards to govern the Boards' actions. There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets its terms and conditions, a Board can nonetheless withhold it from him for activities or conduct not material to the grant or withdrawal of the exemption.

> So to hold would make the Boards free-wheeling agencies, meting out their brand of justice in a vindictive manner." 393 U.S., at 237.

Oestereich, unlike this case, involved a statutory exemption where "there is no exercise of discretion by a Board in evaluating evidence and in determining whether a claimed exemption is deserved." 393 U.S., at 238. Here, appellant's classification was within the discretion of the board and must be sustained by this court if such classification had a "basis in fact".

We believe the Court of Appeals for the Sixth Circuit answers appellant's contention in *Anderson* v. *Hershey*, 1969, . . . F. 2d . . . . In *Anderson*, the court, in upholding delinquency regulations as applied to registrants who had previously been in II-S, I-A, I-Y and III-A classifications, noted that *Oestereich* dealt with, and was meticulously confined to, the application of the delinquency regulations to a statutory exemption. The court then differentiated *Oestereich*, involving an exemption, from the situation involving a deferment, such as here, stating:

> "• • • In the case of an exemption, the Congress has made the decision that qualifying persons shall be beyond the pool of manpower available for military purposes. In the case of a defermnent, the Congress has tried to set priorities, to provide predictability, and to guarantee equality of treatment—but not immunity—for those within the available pool of manpower. An exempt person is predetermined to lie outside the system; a deferred person is within the system. We deem this a significant line of demarcation.

In fact, the 1967 changes in the Selective Service Act restricted the availability of III-A deferments in order to prevent "pyramiding" deferments into an exemption. 50 U.S.C. App. § 456(h); 32 C.F.R. § 1622.30(a); H.R. No. 267, 90th Cong., 1st Sess., 1967 Code, Cong. & Admin. News 1308, 1324. If appellant were to prevail in his contentions, his failure

"If a person is outside the system, the performance or non-performance by him of such collateral duties as possessing his registration certificate will have only a minimal effect on the functioning of the system. Perhaps the only effect would be to increase a local board's difficulty in reclassifying him should his status change (e.g., should a clergyman withdraw from his profession) and should he not notify the board of this change or of a change of address. *But in the case of a deferred person, the impingement on the system of failure to perform a wide range of collateral duties*—registration itself, *returning a completed Classification Questionnaire, notifying a board of change of status, or address, reporting for a medical interview or physical examination*, possessing a certificate, providing evidence that the registrant is satisfactorily pursuing a full-time course of instruction, etc.—*is substantial.*"[1] (Emphasis supplied.) F. 2d at . . .

See, *United States* v. *Pence*, 8 Cir., 1969, . . . F.2d . . .; *United States* v. *Gutknecht*, 8 Cir., 1969, 406 F.2d 494, cert. granted, . . . U.S. . . .; *Kraus* v. *Selective Service System Local 25*, 4 Cir., 1969, 408 F.2d 622.

Appellant also contends that the local board abused its discretion by not removing him from delinquency status and by inducting him, in view of the fact that the United States Attorney had declined prosecution; the State Director of Selective Service had authorized the local board to clear his delinquency, cancel his Order for Induction, and re-open his classification, the local board was aware that he was the sole support of his mother and two chil-

to notify his local board of his change of address and dependency status and his failure to report for physical examination—all violations of his Selective Service duties—would result in his conversion of a deferment into an effective exemption.

[1] "The smooth functioning of the system requires that local boards be continually aware of the status and whereabouts of registrants . . ." United States v. O'Brien, 1968, 391 U.S. 367, 379.

dren; and no registrant over the age of 26 years had been inducted during the period involved.

The letter from the State Director to the local board stated only:

> "If it meets with the approval of your local board, this is your authority to reopen the registrant's classification, cancel his Order to Report for Induction, and to clear his delinquency."

This directive did not impose a mandatory duty upon the local board to take such action. 32 C.F.R. § 1625.3.

It is well-settled that reclassification of a registrant must be based upon some fact which would justify a change in classification but which was not considered in granting the original classification. 32 C.F.R. §§ 1625.2, 1625.3, 1625.11; *United States* v. *Pence*, supra, 8 Cir., 1969, . . . F.2d . . . A registrant is not entitled to have his classification reopened and reconsidered upon a mere naked request, but is required to submit written evidence of objective facts in support of his claim. *Vaughn* v. *United States*, supra, 8 Cir., 1968, 404 F.2d 586, 590.

When the local board, on June 20, 1967, unanimously voted not to reopen appellant's I-A classification or remove his delinquency status, the board had before it information from both appellant and his wife that although appellant was married, he was not living with his wife, and that he had two children living with his mother through his support. These facts are insufficient to entitle appellant to a III-A classification as a father of a child or children with whom he maintains a *bona fide family relationship in their home*. 32 C.F.R. § 1622.30(a). Also, on the basis of the information known to the board, appellant had not made a prima facie case for a III-A "extreme

hardship" deferment. 32 C.F.R. § 1622.30(b). Not only did the board have a basis in fact for appellant's classification and did not abuse its discretion in not reopening appellant's 1-A classification, but it was their duty upon the facts before it to maintain appellant in class 1-A. 32 C.F.R. § 1622.40.

With regard to the local board's refusal to remove appellant from delinquency status on June 20, 1967, the local board was entitled to conclude: (1) That appellant had received his Notice of Classification mailed on June 22, 1966, his Current Information Questionnaire, mailed July 18, 1966, and his Order to Report for Armed Forces Physical Examination, mailed November 28, 1966, *United States v. Griffin*, 2 Cir., 1967, 378 F.2d 899; *United States v. DeNarvaez*, 2 Cir., 1969, 407 F.2d 185; (2) that he had willfully failed to notify the local board of his change of address and marital and dependency status; and (3) that he had willfully failed to report for Armed Forces Physical Examination. The local board therefore had a basis in fact for maintaining appellant in delinquency status.

When appellant requested by letter of July 4, 1967, "cancellation or postponement" of his induction and "reconsideration and reclassification", stating that "conscription would work real and extreme hardship on my Mother and children who couldn't *begin* to sustain themselves on an Army allotment", his situation had not changed since June 20, 1967, when the local board had refused to reopen his classification or remove him from delinquency status. Appellant was therefore not entitled to reclassification. 32 C.F.R. §§ 1625.2, 1625.3, 1625.11; *United States v. Pepper*, supra, at ... ; compare, *Lewis v. Secretary, Department of the Army*, 9 Cir., 1968, 402 F.2d 813.

We find that the local board properly maintained appellant in a delinquent 1-A status and ordered him to report for induction.

Affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX 2

JUDGMENT

UNITED STATES COURT OF APPEALS
For The Eighth Circuit

No. 19465 September Term, 1968

United States of America,

Appellee,

vs.

David B. Troutman,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

It is further Ordered by this Court that the defendant in the said District Court, David B. Troutman, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the District Court.

June 20, 1969

A true copy.

Attest: Robert C. Tucker
Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX 3

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 19405

United States of America,

Appellee,

vs.

David B. Troutman,

Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Petition of appellant for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

July 22, 1969

A true copy.
Attest: Robert C. Tucker
Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX 4

32 CFR, PART 1642 — SECTIONS 1642.1-1642.15

Delinquents

General

1642.1 *Regulations Governing Delinquents.*—Delinquents, as defined in section 1602.4 of this chapter shall be governed by the provisions of this part and such other provisions of the Selective Service Regulations as are not in conflict therewith.

1642.2 *Continuing Duty.*—When it becomes the duty of a registrant or other person to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligaton from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty.

1642.3 *Compliance With Procedures of This Part Not Condition Precedent to Prosecution.*—Compliance by a local board or any other agency of the Selective Service System with any or all of the procedures prescribed by the regulations in this part is not a condition precedent to the prosecution of any person under the provisions of section 12 of the Military Selective Service Act of 1967.

1642.4 *Declaration of Delinquency Status and Removal Therefrom.*—(a) Whenever a registrant has failed to perform any duty or duties required of him under the selective service law other than the duty to comply with an Order to Report for Induction (SSS Form 252) or the duty to comply with an Order to Report for Civilian Work and Statement of Employer (SSS Form 153), the local board may declare him to be a delinquent.

(b) When the local board declares a registrant to be a delinquent, it shall enter a record of such action and the date thereof on the registrant's Classification Question-

naire (SSS Form 100) and shall complete a Delinquency Notice (SSS Form 304), in duplicate, setting forth the duty or duties which the registrant has failed to perform. The local board shall mail the original to the registrant at his last known address and file the copy in his Cover Sheet (SSS Form 101).

(c) A registrant who has been declared to be a delinquent may be removed from that status by the local board at any time. When the local board removes a registrant from delinquency status, it shall enter a record of such action and the date thereof on the registrant's Classification Questionnaire (SSS Form 100) and shall advise the registrant of such removal by letter a copy of which shall be filed in his Cover Sheet (SSS Form 101).

Classification and Induction of Delinquents

1642.10 *Restriction on Classification and Induction of Delinquents.*—No delinquent registrant shall be placed in Class 1-A, Class 1-A-O, or Class 1-O under the provisions of section 1642.12 or shall be ordered to report for induction under the provisions of section 1642.13 or section 1631.7 of this chapter, or, in the case of a conscientious objector opposed to noncombatant training and service, ordered to report for civilian work in lieu of induction, unless the local board has declared him to be a delinquent in accordance with the provisions of section 1642.4 and thereafter has not removed him from such delinquency status.

1642.11 *Registration and Classification of Unregistered Delinquents.*—Whenever a person is a delinquent because he has not registered reports or is brought before a local board, he shall be registered in the normal manner, except that if the local board with which he registers determines that because of his delay in registering he should be declared to be a delinquent under the provisions of section 1642.4 and processed for induction as a delinquent, the local board may enter in item 2 of the Registration Card (SSS Form 1) an address within its jurisdiction. If the local board makes such determination and retains juris-

SUPREME COURT, U. S.

Office-Supreme Court
FILED
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JOHN F. DAVIS, CLE

No. 623

In the Supreme Court of the United States

OCTOBER TERM, 1969

DAVID BARNER TROUTMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
WILL WILSON,
Assistant Attorney General,
PHILIP B. MONAHAN,
Attorney,
Department of Justice,
Washington, D.C. 20530.

In th

which the board had removed a registrant from delinquent status pursuant to the discretionary authority in this regard conferred by 32 C.F.R. 1642.4(c).

Both of the courts below rejected petitioner's contention that the local board abused its discretion in refusing to remove him from delinquent status and in ordering him inducted as a delinquent, after he had attempted to cure his delinquency and had agreed to comply with his duties under the Selective Service laws. They concluded that petitioner had deliberately sought to avoid communicating with the board, and that there was a basis in fact for his being retained in a delinquent status with a 1-A classification after he had reestablished contact with the board. The board's order for petitioner to report for induction was thus a valid one, the courts below determined, and his conviction for violation of that order was accordingly proper.

2. The basic purpose of the delinquency regulations is to compel registrants to comply with their duties under the Selective Service laws by presenting them with the distasteful but honorable alternative prospect of reclassification to 1-A (where the registrant is not already in that category) accompanied by accelerated induction into the Armed Forces. Delinquency declarations seek, wherever possible to effect the registrant's return to compliance with his duties—correction of an oversight if there was merely neglect, purging of a violation should willfulness be present. The delinquency procedures can accordingly be analogized to the judicial authority to pronounce judgments of civil contempt in appropriate situations.

One plausible objection to this analogy is that, under the Selective Service regulations, local boards are given the discretion to determine whether to remove a registrant who seeks to correct his breach of duty from delinquent status, whereas the respondent in a civil contempt proceeding can avoid any perpetuation of the coercive sanction by deciding to comply with the court's order. As to this possible difficulty, it is the government's position that, while the pertinent regulation (32 C.F.R. 1642.4(c)) on its face does make removal from delinquent status discretionary, a reading of that regulation in the context of the regulations as a whole suggests that, at least up to the time of the issuance of an order to report for accelerated induction, it would be an abuse of discretion for a local board to refuse removal from delinquent status where a registrant sought in good faith to correct his breach of duty and return to compliance with his obligations. When the regulations are so construed, the civil contempt analogy is an entirely apt one.[1]

Consistent with this reading of the pertinent regulation, it is the government's view that petitioner is correct in contending that, in the circumstances here involved, he was improperly convicted for failing to report for induction. He was declared delinquent for failing to report for his scheduled physical examination. But petitioner, in his May 1967 letter to the board, as

[1] For a more extended discussion of this matter, see the government's brief in *Gutknecht* v. *United States*, No. 73, this Term (pp. 46-54).

serted that he had been unaware of the board's efforts to contact him and had made no attempt to avoid its authority, and said further that he was willing to comply with its directives, and the Selective Service laws generally, in the future. Through this letter he sought, insofar as was possible, to restore a satisfactory relationship with the board and bring himself back into compliance with his duties under the Selective Service laws—while denying that he had willfully violated any duty or deliberately sought to avoid the board's authority. Under the analysis set out above, the purpose of the delinquency regulations had been accomplished at this point, and the board should have removed the delinquency and restored petitioner to the appropriate classification at that time.

Evidently acting on the assumption that petitioner's delinquency had been willful and his breaches of duty deliberate, the board apparently concluded that it would be a proper exercise of discretion to decline to remove him from delinquent status, despite his denial that he had intentionally violated any order and his expressed willingness to comply with his duties in the future. That the board's refusal to remove the delinquency was, in view of the indications of deliberateness known to the board, a proper exercise of its discretion similarly appears to have been the primary basis of the district court's judgment of conviction, as well as the explicit premise of the court of appeals' affirmance (see Pet. App. 14a). Refusal to remove the delinquency cannot, however, be justified on that ground, because of the underlying purpose of the

delinquency procedures and the limitations which should appropriately be placed on their use in circumstances like those involved here.

Accordingly, if the Court elects to waive the time requirements of its Rules in this case,[2] and accepts our analysis regarding the purpose and limitations of the delinquency regulations in situations where removal of the delinquency is sought by a registrant willing thereafter to comply with his duties, the judgment below should be reversed and a judgment of acquittal ordered to be entered.[3]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

PHILIP MONAHAN,
Attorney.

NOVEMBER 1969.

---

[2] The instant petition was filed two days late. The judgment of the court of appeals was entered on June 20, 1969, and a rehearing petition was denied on July 22, 1969. On August 11, 1969, Mr. Justice Black extended petitioner's time for filing a petition for a writ of certiorari until and including September 20, 1969, but the petition was not filed until September 22, 1969. It is thus out of time under Rule 22(2) of the Rules of this Court.

[3] Since this matter is discussed at length in the government's brief in the *Gutknecht* case—although it is only tangentially raised there—the Court may alternatively wish to defer action on this case until *Gutknecht* has been decided.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT, U. S.

JUL 31 1969

JOHN F. DAVIS, CLERK

No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1969

CARLTON DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Chicago, Illinois 60602
Attorney for Petitioner

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In the
Supreme Court of the United States

OCTOBER TERM, 1969

NO.

CARLTON DRAPER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Carlton Draper, respectfully prays that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit, entered on June 17, 1969.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion here presented for review has not yet been reported. It is set forth as Appendix A.

JURISDICTIONAL STATEMENT

The opinion whose review is sought herein was entered and dated June 17, 1969.

On July 17, 1969, Mr. Justice Marshall extended the time for filing the Petition for Writ of Certiorari herein until July 31, 1969.

The jurisdiction of this court is invoked under provisions of Section 1254(1), Title 28, United States Code.

QUESTION PRESENTED FOR REVIEW

When a defendant in a narcotic prosecution testifies that the government informant to whom he transferred a quantity of narcotics placed that same quantity of narcotics in the defendant's possession to the end that it be redelivered under circumstances incriminatory of the defendant, does the government sustain its burden of proof where it fails to rebut the defendant's testimony, or may the government rely upon the possibility that the jury will simply disbelieve a defendant whose defense will necessarily concede that he engaged in the very transaction charged in the indictment?

STATEMENT OF THE CASE

Petitioner was charged with having engaged in a transaction involving the transfer of a quantity of heroin on June 16, 1967, in violation of Section 174, Title 21, United States Code.

The government's evidence disclosed that Federal Narcotic Agent Jordan monitored two telephone calls made by the government informant Hernandez to the defendant's house. In the first call, the agent testified that

Hernandez told the defendant that he had a buyer for the heroin, to which the defendant replied that he did not want to meet anyone and that if the sale went down, the informant was to come alone. The defendant added that he had two ounces and that the price would be $1200 (Tr. 15-19).

On the following day, Agent Jordan again monitored the informant's call. The informant said everything was ready. The defendant reiterated that he had about two ounces and that the price was $1200. A rendezvous was arranged (Tr. 20-21). On the informant's arrival at the rendezvous, the defendant entered the informant's car with defense witness Sheain (Tr. 22-24). He was arrested almost immediately by the observing agents who, upon reaching the informant's car, saw the defendant with a number of foil packets, one of which he held open (Tr. 25-26).

Agent Jordan testified that the informant Hernandez had been subpoenaed by the government a few days before trial but that the government had been unable to locate him since then (Tr. 34-35).

On cross-examination, the agent testified that Hernandez became a government informant sometime in April, 1967, following his own apprehension as a narcotic violator (Tr. 115). His first co-operation with the government resulted in the arrest of petitioner (Tr. 173). The agent testified that the informant, acting in the agent's behalf, was to perform police functions, as to which the agent gave him no instruction (Tr. 122-123).

The defendant admitted the telephone conversations with the informant, but denied the words "heroin" and "1200" were used (Tr. 316). He testified that some two or three weeks before his arrest, the informant had placed the drugs in his possession for safekeeping (Tr. 277-278) and that in returning them to the informant, he had thrown the package on the seat (Tr. 288). According to the defendant, the informant opened the package, looked at the contents, and made no reply when asked by the defendant why he was looking at the contents (Tr. 289).

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

In the Court of Appeals petitioner urged that where evidence was introduced that the narcotic subject matter of the offense alleged was itself placed in his hands by the government informant, entrapment as a matter of law was established, so that the burden fell upon the government to introduce evidence which would tend to rebut the defendant's testimony.

Here, the defendant testified that the narcotics he transferred to the informant were narcotics which the informant had himself placed in the defendant's hands a short time before the transaction with which the defendant was charged. Presumably, the informant would thus square his own account with the government upon the charges which he faced.

In *Sherman* v. *United States*, 356 U.S. 369, this Court found entrapment as a matter of law, where the persistence of the entrapping informer finally wore through the truly marginal resistance of a previous narcotic offender. Although the reversing majority permitted its opinion to balance on the proposition that the defendant's "ready complaisance" had been insufficiently established by the government in rebuttal, the reversing majority reserved its actual horror for the acts of the government agent who procured Sherman's violation.

A concurring minority (four judges) would have arrived at an identical result via a different route. The minority would have set aside the conviction ". . . not because [Sherman's] conduct falls outside the proscription of the

statute, but because even if his guilt be admitted, the methods employed on behalf of the government to bring about conviction cannot be countenanced." (*Sherman*, 380).

In *Accardi* v. *United States*, 257 F.2d 169, 172, 173 (5 Cir., 1958), the court observed that the majority in Sherman had reaffirmed its emphasis on the defendant's prior intentions or his readiness to commit an offense, but felt called upon to note ". . . the court by no means downgrades the duty of scrutinizing closely the conduct of the government agents." In *Accardi* (n., page 173) the court observed that the majority in *Sherman* attached almost as much importance as the minority to the "*conduct of the government agents*", (emphasis, the court's) saying "there is scarcely a decibel's difference in their expressions of shock and outrage in the agent's methods."

Whatever rationale is employed by the courts, the net result seems to be that if the conduct of a government agent is sufficiently shocking, one never really gets to the question as to whether or not the defendant had a predisposition to commit the offense. Thus, where the agent engages in conduct which shocks the conscience of the court, and *where there is no rebuttal of the evidence which establishes that conduct*, the fact that the defendant is disclosed to have had a predisposition to violate the law does not effect the result, and entrapment as a matter of law follows:

In *Waker* v. *United States*, 344 F.2d 795-796 (1 Cir., 1966), the court stated in relevant part ". . . where the inducement was not shocking or offensive *per se*, the only issue is whether the defendant was sufficiently predisposed, so that while the particular offense was brought about by the government agent, the defendant's criminality or 'corruption' was not." Inferentially, if the induce-

ment was shocking or offensive *per se,* that provides a separate issue, as to which the government has a positive burden of proof.

Whiting v. *United States,* 321 F.2d 72, 75-6 (1 Cir., 1963) focuses the question more precisely, in terms of allocating law questions and fact questions, and in distributing the burdens of proof.

Whiting holds that in analyzing entrapment cases the court must first decide whether or not there was an entrapment as a matter of law. And once it is shown that a government agent induced a sale of narcotics then, "the government should establish that it engaged in no conduct that was shocking or offensive per se, *and* that the defendant was not, in fact, corrupted by the government" (*Whiting,* 76, emphasis supplied).

In *Accardi* v. *United States,* 257 F.2d 169 (5 Cir., 1958), the court discussed at length the evident readiness of the defendant to join a narcotic conspiracy. Turning to the matter of the agent's inducement and observing that the inducement consisted in no more than a simple solicitation to the defendant, the court remarked (page 173) "On such evidence as is undisputed, the agents' conduct does not shock the conscience of this court. There was no entrapment as a matter of law" (i.e., where what is questioned is entrapment "as a matter of law," we analyze the *agent's* acts, not the defendant's).

In its opinion, the court below simply took the view that the defendant's version of the transaction was one which the jury was free to disbelieve, embracing the account of the government agents while rejecting the defendant's.

We suggest that the evidentiary configuration envisaged by the opinion is fundamentally unfair. The government is enabled thereby to employ the services of in-

formants who have every motive to injure others, offending or not. Informants who not only are motivated to do injury, but whose moral refinement exerts no inhibition upon them to refrain from injuring the unoffending.

The balance struck by the Court of Appeals between the testimony of the kinds of persons likely to appear as defendants and the testimony of badge-wearing agents of the United States is specious. Juries will *always* reject the testimony of the defendant in such matters whose defense requires admission of the offense, placing their reliance in the readily apparent moral superiority of the agents. Kept from the jury's view is the only government agent who has any importance whatever to the case—the informant. Thus the government is enabled to create the impression that its entire cast is decent and objective, while in point of fact, production of the informant before the jury would require the jury to adjudge something other than a popularity contest in which one side always enjoys a commanding, though undeserved, advantage.

We respectfully submit that where the testimony of the defendant establishes conduct of the government by its informant agent which is offensive *per se* the government is not entitled to rely upon a contest which pits the apparent veracity of the official government agent against that of the less than prepossessing defendant.

CONCLUSION

For the foregoing reasons we respectfully urge that this petition for a writ of certiorari be granted.

Respectfully submitted,

FRANK W. OLIVER
Attorney for Petitioner

APPENDIX

APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1968, APRIL SESSION, 1969

No. 17012
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
CARLTON C. DRAPER,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 17, 1969

Before MAJOR, *Senior Circuit Judge*, and KILEY and SWYGERT, *Circuit Judges*.

MAJOR, *Senior Circuit Judge*. Defendant Draper was charged by indictment with receiving, concealing, buying and selling heroin, in violation of Title 21 U.S.C.A. Sec. 174. His first conviction, following a jury trial, was vacated on the premise that the jury had been improperly instructed. The case was retried, again by a jury which, on March 28, 1968, returned a verdict finding him guilty. From a judgment entered thereon defendant appeals.

The case is here solely on the basis that the court erred in its refusal to allow defendant's motion for judgment of acquittal made at the close of the evidence. The motion stated "that the defendant had shown a prima facie case of entrapment and that the government failed to carry its burden at that stage of showing that the defendant was not induced to commit the offense, or if he was induced to commit it that he had a previous disposition to commit it, had adduced no evidence to negate the defendant's contention that the heroin was originally placed in his hands by the informant, and had otherwise failed to prove a prima facie case."

Defendant's counsel, evidently in an effort to escape the rule, established by many cases, that ordinarily the defense of entrapment presents a jury question, contends that this is not a "standard entrapment" case. He argues that Hernandez, from whom defendant admittedly obtained possession of heroin, was an admitted government informer: that the conduct of the latter was "shocking or offensive per se," and that the government did not sustain its burden of rebutting defendant's testimony as to the circumstances under which he received possession of the heroin. This contention rests on the failure of the government to call the informer as a witness.

We think there is little, if any, merit in defendant's contention. Even so, we are disposed to make an abbreviated statement of the evidence, keeping in mind the general rule that it must be considered in a light most favorable to the government. *Glasser* v. *United States*, 315 U.S. 60, 80; *United States* v. *Weaver*, 360 F.2d 903 (CA-7), cert. den. 385 U.S. 825.

Federal narcotics agent Jordan testified that he watched as the informant, Hernandez, dialed defendant's telephone number and that he secured Hernandez's permission to listen in on the call. The agent recognized defendant's voice. Hernandez asked if it was defendant and was told it was. Hernandez said he had a buyer for heroin. Defendant said, "If the purchase goes down, I don't want to meet anybody. Just come alone." Hernandez said that would be fine. Defendant then said, "I have two ounces and the price would be twelve hundred dollars." Hernandez agreed to call defendant on Friday, June 16, 1967, at 10:30 a.m.

On Friday, agent Jordan again observed Hernandez dial defendant's number, and listened in on the phone conversation. Defendant answered, Hernandez said everything was ready and asked if defendant was ready. Defendant said he was, and reiterated that he had approximately two ounces and the price was twelve hundred dollars. Defendant instructed Hernandez to meet him at the twenty hundred block of North Halsted Street at about noon.

Agent Jordan was then joined by agent Kuksta, and they followed Hernandez to the appointed meeting place where they parked 100 feet from Hernandez' car. A short while later defendant and a girl crossed the street and got into Hernandez' car. After a short wait, the agents left their car and on reaching Hernandez' car saw defendant holding several aluminum foil packets, one of which he had open, and in this aluminum packet was a quantity of white powder. The agents then arrested defendant and the girl. After his arrest, defendant said he had only one thing to say and that was that the girl was not responsible for anything that happened.

Agent Kuksta corroborated agent Jordan as to what transpired at the time of defendant's arrest.

Defendant testified that he was acquainted with Hernandez and thought it possible that he was in the drug traffic but denied any drug transactions with him. He admitted that on June 16, 1967, he entered Hernandez' car and "gave him his package," a package which Hernandez had brought to defendant's house and left in his keeping two or three weeks before defendant's arrest. Defendant testified that Hernandez, at the time he gave defendant the package, stated, "Here, set on this for me." Defendant admitted to numerous telephone conversations with Hernandez as testified to by agent Jordan, but denied that either the word "heroin" or the words "twelve hundred dollars" were mentioned. Defendant testified that when he entered the car shortly before his arrest he stated, "Here, man," and threw the package on the seat. Hernandez opened the package, looked at it and made no reply when defendant asked him why he was looking at it.

Cheryl Sheain, who was in the car with defendant at the time of his arrest, testified that Hernandez asked defendant if he had the package and said he wanted to see it.

Defendant's contention that he was entitled to a directed verdict on the ground that the government failed to call the informer as a witness to rebut defendant's testimony is without merit. The testimony of agent Jordan as to the means employed by the informer to purchase the heroin, the agreement as to price and quantity, and defendant's insistence on secrecy, is wholly inconsistent with that of defendant that the heroin was left in his possession by the informer only for the purpose of later being reclaimed by him. Certainly this contradictory testimony was sufficient to present a jury question.

In *Masciale* v. *United States*, 356 U.S. 386, under a factual situation quite similar to that here and where the informer was not called as a witness, the court in deciding the issue adversely to the defendant stated (page 388):

> "As for [the informant], petitioner testified that the informer engaged in a campaign to persuade him to sell narcotics by using the lure of easy income. Petitioner argues that this undisputed testimony explained why he was willing to deal with [the agent] and so established entrapment as a matter of law. However, his testimony alone could not have this effect. While petitioner presented enough evidence for the jury to consider, they were entitled to disobey him in regard to [the informant] and so find for the Government on the issue of guilt. Therefore, the trial court properly submitted the case to the jury."

This court in *United States* v. *Caro*, 350 F.2d 862 (1965), followed Masciale in a case where the defendant, as here, testified that he had been approached by the informant to act as his messenger in giving a package to the undercover agent. Quoting the Masciale language excerpted above, we held that the defendant's testimony, unrebutted by the informant, did not establish entrapment as a matter of law but merely created a question of fact to be resolved by the trier of fact.

This court again considered the effect of a missing informant in *United States* v. *Simons*, 374 F.2d 993 (1966), cert. den. 386 U.S. 1025. There we stated (page 995):

> "We see no merit in this case in the contention that entrapment was established as a matter of law. The testimony favorable to the government shows that Simons readily entered into the transaction with the agent."

In *United States* v. *Pugliese*, 346 F.2d 861 (CA-2), the court in reviewing a narcotic conviction (the informer was deceased at the time of trial), citing *Masciale* stated (page 862):

> "We need not decide whether defendant's testimony, if true, warranted a directed verdict in his favor. The jury was entitled to disbelieve defendant's version of the facts and to rely only on the evidence presented by the government."

Defendant poses the question, "Can it seriously be contended that the act of a government agent in placing a narcotic in the hands of the defendant, and then procuring his prosecution for possessing it, is not offensive and shocking per se, despite the trial judge's belief to the contrary?" A number of Illinois cases are cited which purportedly require an answer favorable to defendant. It will be time enough to answer this question and consider cases relied upon by defendant when we are confronted with a pertinent factual situation. The fallacy of the contention, of course, resides in the fact that a response favorable to defendant would require the jury to accept his testimony and ignore that of the agents. This, as we have shown, the jury was not required to do.

The informer's identity was known to the defendant; in fact, they were longtime acquaintances. There is not even a suggestion that the government sought to conceal his identity or to prevent his presence at the trial. The record shows that the government made a reasonable effort to procure his attendance. The prosecutor talked to him the day before the trial and not only obtained his promise to be present but served a subpoena on him calling for his attendance.

No case is called to our attention and we know of none where it has been held under similar circumstances that the government's case must fail because it did not produce the informer as a witness. Whether the informer was produced or not, there was still the question from the testimony the jury heard whether it should credit the testimony of the defendant or that of the agents.

The judgment appealed from is

AFFIRMED.

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No. 411

In the Supreme Court of the United States

OCTOBER TERM, 1969

CARLTON DRAPER, PETITIONER

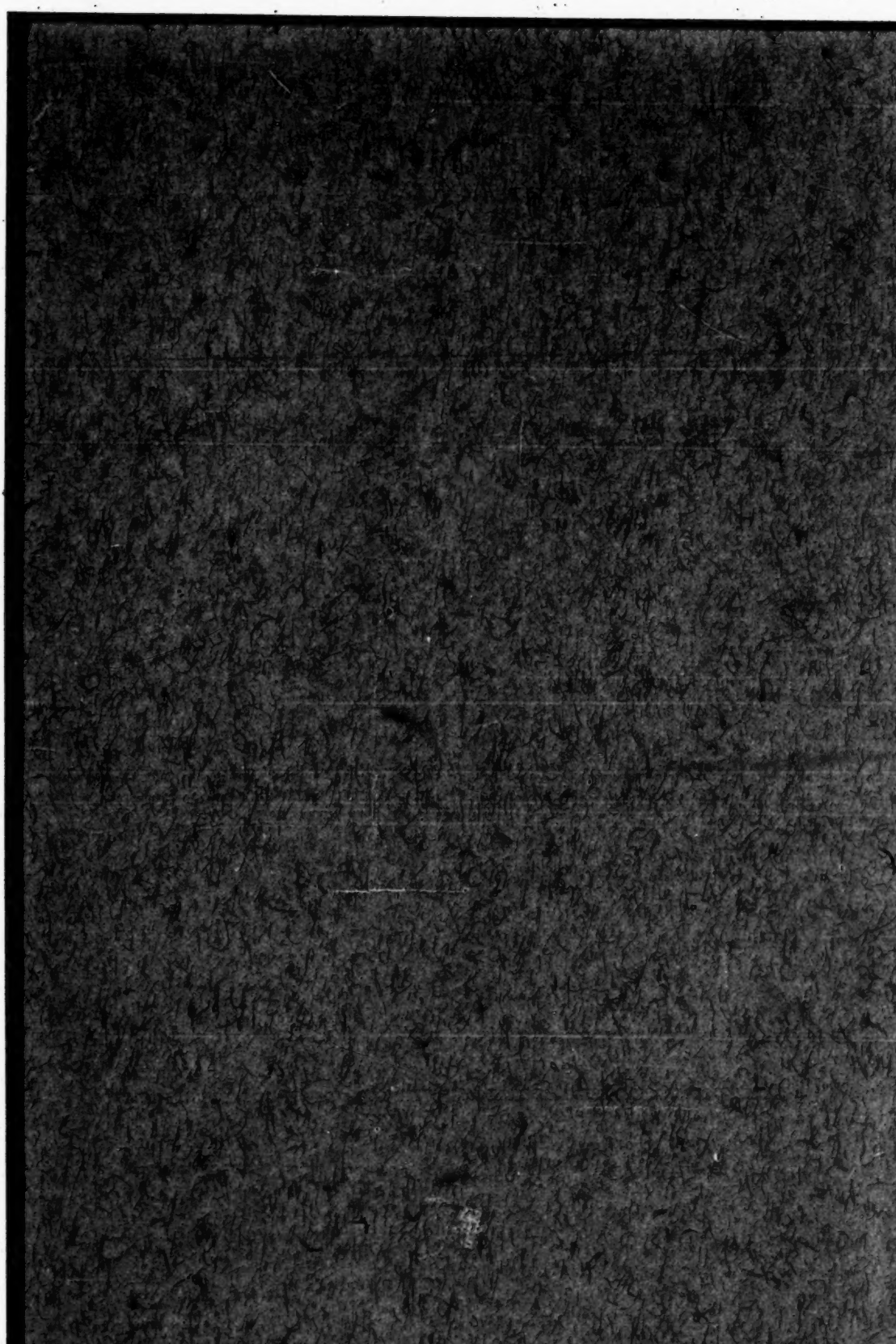
v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 411

CARLTON DRAPER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a trial by jury in the United States District Court for the Eastern District of Illinois, petitioner was convicted of receiving, concealing, etc., 45.45 grams of heroin which he knew had been unlawfully imported, in violation of 21 U.S.C. 174. He was sentenced to imprisonment for a period of ten years (App. 1).[1] The court of appeals affirmed (Pet. App. 1–7).

A narcotics agent listened with the consent of an informant to the latter's telephone conversation with petitioner. The informant told petitioner he had a buyer

[1] "App." refers to the appendix to petitioner's brief in the court of appeals, filed by petitioner as the record in this case. "Pet. App." designates the appendix to the petition for certiorari.

for the heroin and wanted to introduce him. Petitioner said "if the sale went down" he did not want to meet anyone other than the informant, but that he had two ounces and the price would be $1,200. On a similar call the following day, petitioner confirmed the arrangement and fixed a meeting place. The informant, after being searched and given money by narcotics agents, drove to the designated spot. Petitioner and a woman entered the informant's car. The agents then approached the car and saw petitioner seated in the front seat holding several aluminum foil packets, one of which was open and contained a white powder. They arrested petitioner and seized the packets, which proved to contain heroin (App. 3, 7).

Diligent efforts by the government to obtain the presence of the informant at trial were unsuccessful (App. 8). Petitioner testified that the informant, with whom he was well acquainted, had given him a package several days before the arrest, asking him to keep it temporarily. Although he suspected that the informant was engaged in the drug traffic and that the package was heroin petitioner agreed to keep the package (App. 9–10). Arrangements to pick it up had been made by two subsequent telephone calls. After petitioner had delivered the package to the informant's car, the arrest took place.

Petitioner's sole contention is that the government did not sustain its burden of proof because it offered no rebuttal testimony to contradict his testimony. Petitioner's version of the arrangement, however, was already contradicted by the testimony of the narcotics agent who listened to the telephone conversations in

which petitioner offered to sell two ounces of narcotics for a stipulated price. The issue is thoroughly canvassed in the opinion of the court of appeals which properly held that the question of entrapment was for the jury. *Masciale* v. *United States*, 356 U.S. 386.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1969.

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[2] Although petitioner does not raise a challenge to the validity of the presumption under 21 U.S.C. 174 which was charged in this case, the constitutional validity of that presumption is presently pending before the Court in *Turner* v. *United States*, No. 190, O.T., 1969. Accordingly, the Court may wish to defer disposition of the present petition until after it decides *Turner*.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

TROUTMAN *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 623. Decided February 24, 1970*

PER CURIAM.

The motion to proceed *in forma pauperis* in No. 411, Misc., is granted. The petitions for writs of certiorari are granted, the judgments are vacated and the cases remanded to the respective United States Courts of Appeals for further consideration in light of *Gutknecht* v. *United States*, 396 U. S. 295.

*Together with No. 411, Misc., *Battiste* v. *United States*, on petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.